IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANT TYSON POULTRY, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT WITH REGARD TO PLAINTIFFS' CLAIMS UNDER CERCLA AND RCRA (Dkt. No. 2062)

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INTRODUCTION

Defendant Tyson Poultry, Inc. ("Tyson") respectfully submits this brief in opposition to Plaintiffs' Motion for Partial Summary Judgment ("Motion" or "Mot."), addressing specifically Plaintiffs' arguments under CERCLA and RCRA.[1] The parties agree that Plaintiffs CERCLA claims are ripe for summary disposition. Given Plaintiffs untenable insistence on defining each phosphorous-containing compound as a CERCLA "hazardous substance," their sweeping and legally unsupported definition of "facility," and failure of evidence as to the "normal application of fertilizer," summary judgment is appropriately awarded in Defendants' favor. Similarly, the parties agree that whether poultry litter is a "solid waste" under RCRA is appropriate for summary judgment. In view of EPA's thirty year history of not treating animal manure as RCRA solid waste, summary judgment is appropriate in Defendants' favor. Moreover, Plaintiffs have failed to establish a basis for summary judgment as to whether Defendants contribute to the creation of a substantial endangerment, nor indeed whether a substantial endangerment even exists in the IRW. Accordingly, Plaintiffs' motion should be dismissed in all respects.

LEGAL STANDARD

The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Adler v. Wal-Mart Stores*, 144 F.3d 664, 670 (10th Cir. 1998). "[An] issue of fact is 'genuine' if the evidence allows a reasonable jury to resolve the issue either way and is 'material' when it is essential to

[1] The Court authorized Plaintiffs to file a "reasonably sized summary judgment motion." *See* Minute Order, Dkt. No. 1846 (Feb. 4, 2009). Plaintiffs took that Order to authorize a 64-page summary judgment brief. The Court's Order did not address Defendants' page allowance for a brief in opposition. In order to respond to Plaintiffs' submission in a manner compliant with the local rules, Defendants have divided their response between a fact brief and two legal briefs, which combine to fewer substantive pages than used in Plaintiffs' Motion, and in which all Defendants will join. If the Court prefers, Defendants can refile a single, unified brief.

the proper disposition of the claim." *Haynes v. Level 3 Comm.*, 456 F.3d 1215, 1219 (10th Cir. 2006). All factual inferences are drawn in favor of the non-moving party, *see Adler*, 144 F.3d at 670, and the party with the burden of proof "must set forth specific facts showing a genuine issue for trial as to those dispositive matters." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1169 (10th Cir. 2004). Where the moving party bears the burden of persuasion at trial, it must come forth with sufficient evidence to support the essential elements of its claims, not simply identify the absence of facts supporting defenses. *See Adler*, 144 F.3d at 670.

STATEMENT OF DISPUTED FACTS

This motion incorporates and relies upon the Statement of Disputed Facts set out in full in *Defendant Tyson Foods, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment—Statement of Undisputed Facts*, Dkt. No. 2183 (June 5, 2009) ("Disputed Facts").

I. DEFENDANTS, NOT PLAINTIFFS, ARE ENTITLED TO SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFFS' CERCLA CLAIMS

Plaintiffs first seek summary judgment as to the same three CERCLA elements that were the subject of *Defendants' Motion for Summary Judgment On Counts 1 and 2 of the Second Amended Complaint*, Dkt. No. 1872 (Feb. 18, 2009) ("Defendants' CERCLA Motion"). *See also* Dkt. No. 1925 (Mar. 23, 2009) ("Defendants' CERCLA Reply"). Specifically, (1) whether the orthophosphates contained in poultry waste constitute a CERCLA "hazardous substance;" (2) whether Plaintiffs have identified evidence of a proper CERCLA "facility;" and (3) whether Plaintiffs can prove a CERCLA "release." Mot. at 35-39. The parties agree that these three issues are ripe for summary judgment. However, as set forth below and in Defendants' CERCLA Motion and Reply, summary judgment should be granted in favor of Defendants.

A. The Orthophosphates in Poultry Litter Are Not CERCLA Hazardous Substances

Plaintiffs' CERCLA claims fail because the orthophosphates in poultry litter are not

CERCLA hazardous substances.[2] *See* Dkt. No. 1872 at 5-12; Dkt. No. 1925 at 1-5. Although orthophosphates are not listed as a CERCLA hazardous substance, *see* 40 C.F.R. § 302.4, Plaintiffs nevertheless urge this Court to read EPA's hazardous substances list to incorporate thousands of unlisted phosphorous compounds. *See* Mot. at 36. This interpretation is flawed both legally and as a matter of basic chemistry.[3] *See* Dkt. No. 1872 at 5-12; Dkt. No. 1925 at 1-5. Moreover, Plaintiffs' assertions contradict EPA's view that "phosphorus … compounds other than those listed are not hazardous substances." *See id.* (citing Dkt. No. 1872, Ex. 23).[4] For these and all other reasons set forth in Defendants' CERCLA Motion and Reply,[5] Plaintiffs' request for partial summary judgment on this issue should be denied.

B. Plaintiffs Have Not Identified a Proper CERCLA Facility

Plaintiffs have also failed to identify a proper CERCLA facility. *See* Dkt. No. 1872 at 18-25; Dkt. No. 1925 at 8-10. Plaintiffs' proposal that the entire million-acre IRW be treated a

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[2] Plaintiffs have finally conceded their inability to prove claims related to substances other than phosphorous and bacteria, and have acknowledged that at trial they will pursue only CERCLA response costs and natural resource damages claims associated with the alleged release of phosphorous from poultry litter. *See* Dkt. No. 2118 at 3-4 (Mar. 18, 2009). Accordingly, summary judgment is appropriate on Defendants' CERCLA Motion with respect to Plaintiffs' claims regarding any other alleged hazardous substance. *See* Dkt. No. 1872 at 5-8.

[3] Indeed, if Plaintiffs' interpretation were accepted, not only would EPA's decision to list 48 specific phosphorus compounds (while explicitly removing four others) in 40 C.F.R. § 302.4 be rendered superfluous, but every substance containing a phosphorus compound would necessarily be classified as a CERCLA hazardous substance—including all living organisms, as well as thousands of human food products and all commercial fertilizers. *See* Dkt. No. 1925 at 4-5.

[4] Plaintiffs rely here, as they do repeatedly in their Motion, on Judge Eagan's opinion in *City of Tulsa v. Tyson Foods, Inc., et al.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (*vacated*). Plaintiffs admit this vacated opinion has no precedential value. *See* Pls. CERCLA Opp. at 12 n.5. Further, the opinion is not persuasive authority, as the EPA guidance memo and other authorities demonstrating the impropriety of Plaintiffs' interpretation were not available to Judge Eagan.

[5] In order to respond to Plaintiffs' incorporation of their prior briefing, Defendants likewise incorporate by reference all facts, arguments and authorities set forth in Defendants' CERCLA Motion and Reply. *See* Dkt. No. 1872 at 5-12; Dkt. No. 1925 at 1-5.

single facility is legally unprecedented. *See* Dkt. No. 1872 at 19-24; Dkt. No. 1925 at 8-10.[6] Plaintiffs' alternative definition comprising multiple non-contiguous locations within the IRW where alleged hazardous substances have been released or have come to be located, *see* Mot. at 36-37; Pls. CERCLA Opp. at 21-25, is similarly disallowed under CERCLA, and is moreover wholly unsupported by record evidence identifying any of the purported non-contiguous facilities. *See* Dkt. No. 1872 at 24-25; Dkt. No. 1925 at 10. For these reasons and those set forth in Defendants' CERCLA Motion and Reply, this request too should be denied.

C. There Is No CERCLA "Release" From the Normal Application of a Fertilizer

Plaintiffs, not Defendants, must prove the existence of a CERCLA-covered "release," which by definition excludes the "normal application of a fertilizer." *See* 42 U.S.C. § 9601(22); Dkt. No. 1872 at 12-13; Dkt. No. 1925 at 7-8. As detailed in Defendants' CERCLA Motion and Reply, the undisputed facts demonstrate that poultry litter use in the IRW constitutes the "normal application of a fertilizer," as properly defined by the objective requirements imposed by current and past state laws and regulations and the customary usage of farmers in accordance with those laws. *See* Dkt. No. 1872 at 12-18; Dkt. No. 1925 at 7-8. Accordingly, Plaintiffs' request for partial summary judgment on this issue should also be denied.

II. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR RESOURCE CONSERVATION AND RECOVERY ACT CLAIM IN COUNT 3

Next, Plaintiffs seek summary judgment as to several elements of their RCRA claim.

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[6] Plaintiffs' new characterization of the entire IRW as a "unitary hydrologic unit" does not alter this fact, as it is invalid as a both a matter of fact and a matter of law. Plaintiffs' alleged facility is not limited to the waterways and drainage areas in the IRW, but rather consists of all parcels of real-property in the IRW—including retail, commercial and residential property. *See* Dkt. No. 1872 at 1 ¶¶1-2, 20-21. Furthermore, no court has ever recognized such an overbroad definition of a CERCLA facility where, as here, plaintiffs have failed to establish that the alleged hazardous substance has come to be located throughout the entire facility. *See* Dkt. No. 1872 at 19-25; Dkt. No. 1925 at 8-10.

These claims are legally defective and factually unsupported or disputed.[7]

A. Poultry Litter Is Not a RCRA-Covered "Solid Waste"

As Defendants demonstrated in their motion for summary judgment as to Count 3, *see* Dkt. No. 2050 at 9-19 (May 14, 2009) ("RCRA Mot."), poultry litter simply is not a "solid waste" as that term is applied under RCRA. As the useful and valuable result of agricultural activity that is bought, sold, and put to a beneficial use, poultry litter falls outside the statutory definition of "solid waste." *Id.* at 9-14. This conclusion is consistent with RCRA's statutory text and legislative history, prior judicial treatment, EPA's enforcement, and Oklahoma officials' understanding of RCRA. *See id.* The parties concur that this issue is ripe for resolution on summary judgment. Plaintiffs' arguments for a ruling in their favor, however, are legally untenable.

1. Materials reused in a different industry are not *necessarily* RCRA solid waste

The parties agree that whether poultry litter is a RCRA "solid waste" turns on the statutory definition of that term. *See* Mot. at 39-40; RCRA Mot. at 10.[8] Moreover, all agree that application of that definition turns on whether poultry litter is "discarded." *See* Mot. at 40; RCRA Mot. at 10. Rather than discuss the factors that indicate whether something has been discarded—such as whether the material has been put to a beneficial use, whether it has market value, and the intent of the party allegedly discarding—Plaintiffs propose that the sole metric of whether something is discarded should be whether it is reused immediately "'in a continuous

[7] Admittedly, Defendants do not dispute that they are "persons" within 42 U.S.C. § 6903(15).

[8] Defendants proceed from the statutory definition of "solid waste," not from any more narrow regulatory definition as Plaintiffs suggest. *Compare* RCRA Mot. at 9-10, *with* Mot. at 39. In fact, the Second Circuit's decision in *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, cited by Plaintiffs, makes clear that the regulatory scheme they reference regards only "hazardous wastes" under RCRA, which are not implicated in this suit. 989 F.2d 1305, 1314-15 (2d Cir. 1993).

process by the generating industry itself.'" Mot. at 40 (quoting *American Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987)). This construction is legally wrong and nonsensical in practice.

First, Plaintiffs' argument is inconsistent with the statutory text and its judicial treatment. Something is "discarded" when it is "disposed of," "thrown away," or "abandoned." *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2000); *Am. Mining Congress*, 824 F.2d at 1179; *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 481 (D. Minn. 1995); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). Materials are not "disposed of," "thrown away," or "abandoned" merely on account of being transferred to another industry, particularly when paid for. Holding that something is "discarded" simply because it is purchased or used by a different business or a different process within the same business sweeps far broader than the statutory text.

Second, Plaintiffs' proposed rule is largely unsupported by the cited authorities. *See* RCRA Mot. at 11 n.2. In *American Mining Congress*, 824 F.2d at 1178, the D.C. Circuit held that EPA exceeded its authority under RCRA when it attempted to regulate secondary materials such as hydrocarbons and reprocessed ore that were reused within an ongoing production process. *See id.* at 1178. The D.C. Circuit held that Congress had intended "to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. Therefore, materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself" are not RCRA solid waste. *Id.* at 1186. The D.C. Circuit said nothing about the status of materials that are reused in a different process.

In *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993), the court held that EPA did not abuse its discretion under RCRA in treating lead plates recovered and recycled from batteries as RCRA solid waste. ILCO had argued that because it was recycling the plates, it was

not discarding them. *See id.* at 1131. The Eleventh Circuit found this to be irrelevant, however, because the batteries had been discarded before reaching ILCO. *See id.* at 1132 ("Previously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste."). The Court did not hold, however, that the mere fact that the batteries changed industries necessarily rendered them "discarded," only that these batteries had in fact been previously discarded. *Id.* at 1128-29.

Plaintiffs' best case is *Owen Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994), where the Fourth Circuit relied on *American Mining Congress* for the proposition that under RCRA "the fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is *immediately* recycled for use in the same industry." *Id.* at 150 (emphasis added). But even there, the court based its conclusion that EPA was reasonable in treating slag from steel smelting as RCRA solid waste on the fact that the slag lay on the ground unused for many months before perhaps being reused, not solely on the fact that it was transferred between processes. *See id.* at 148, 150. As in *ILCO*, the court held that the slag had been discarded before being reclaimed. *See id.* at 149.

And in any event, the D.C. Circuit subsequently rejected the Fourth Circuit's reading of *American Mining Congress* (and the argument Plaintiffs advance here), making clear that it had never "said that the RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Instead, it held that fertilizers made with zinc recycled from other industries were not RCRA solid waste.[9] Thus, Plaintiffs' authorities do not support their construction.[10]

[9] Plaintiffs' effort to distinguish *Safe Foods* as regarding the reuse of materials that were identical to the virgin materials, *see* Mot. at 42, is both wrong and misleading. First, the materials in question were not identical. As the D.C. Circuit noted, the EPA "had set metal

Third, Plaintiffs' suggestion that materials must be considered "discarded" and therefore RCRA "solid waste" merely by virtue of being transferred between processes or industries is nonsensical. The inquiry into whether something is discarded allows courts to distinguish between useful products from wastes being thrown away. Yet if transfer to another process or industry alone renders something a solid waste, then RCRA must reach products manufactured specifically for another industry or process such as the manufacture of raw chemicals, the supply of food ingredients, and even the creation of packaging and shipping supplies—all things that clearly are not being thrown away and discarded by any definition of the term. Clearly, that cannot be the law. It is therefore not surprising that EPA has embraced the D.C. Circuit's view in *Safe Foods*, not the Fourth Circuit's view in *Owen Steel*, stating that it "has the discretion to determine if material is not a solid waste, even if it is transferred between industries." *See* EPA, *Proposed Rules: Identification of Non-Hazardous Materials That Are Solid Waste*, 74 Fed. Reg. 41-01 (Jan. 2, 2009). As Plaintiffs acknowledge, *see* Mot. at 44, EPA's view merits deference. *See Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 558 (10th Cir. 1986).

The mere fact that material is transferred from one process or industry to another does not render it "discarded." Instead, as set out in Defendants' RCRA Motion, whether materials are

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contaminant limits higher--sometimes considerably higher--than the highest level found in the twenty virgin commercial fertilizer samples it used as its benchmark." *Safe Foods*, 350 F.3d at 1269. Second, the D.C. Circuit held the differences to be "substantively meaningless" not as a function of their chemical makeup, as Plaintiffs represent, but as a function of potential "health and environmental risks." *Id.* at 1270.

[10] Moreover, poultry litter *is* reused within the same agricultural industry that creates it. Numerous poultry growers testified that they contract with Defendants specifically in order to obtain access to poultry litter, which they can they use to reclaim poor quality land and/or grow crops to support their cattle operations. *See* Defendants' RCRA Motion, Dkt. No. 2050 at 17-18 (citing sources); Disputed Facts ¶25. These industries coexist symbiotically, and litter is often reused, as Plaintiffs are want to observe, on the very farms where it is produced. Poultry litter also provides Contract Growers with a valuable resource that they can sell or barter, thereby increasing the profitability of their operation. *See id*.

discarded depends on a number of factors including whether the product has and is put to a beneficial use, and whether the product has market value. *See* RCRA Mot. at 11-14. Under this test poultry litter is not RCRA solid waste.

2. RCRA's plain language, judicial treatment, EPA's enforcement, and Oklahoma's practices all demonstrate that animal manures returned to the soil as fertilizer are not RCRA "solid waste"

Plaintiffs next attack a straw man, challenging the appropriateness of reading an exception for animal manure into RCRA based on a single quote from legislative history. *See* Mot. at 42-43. But Defendants have not done so. Rather, Defendants' RCRA Motion demonstrates that the legislative history in question—which states clearly that Congress did not intend for animal manures returned to the soil as fertilizer to be treated as RCRA solid wastes[11]—is entirely consistent with the statutory text, judicial interpretations, and federal and state enforcement of RCRA. *See* RCRA Mot. at 9-18. In limiting "solid waste" to "discarded materials," Congress plainly excluded beneficially used and valuable products.

Indeed, applying RCRA's plain language and mindful of Congress's instructions, EPA has consistently, from the first, declined to treat animal manures that are returned to the soil as fertilizer as RCRA-covered solid wastes. *See* RCRA Mot. at 14-17. To contradict this showing, Plaintiffs cite a lone complaint filed by the Department of Justice, which, Plaintiffs argue, describes EPA's real views. *See* Mot. at 43-44. Plaintiffs are wrong for several reasons.

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[11] In particular, the Congress that enacted RCRA stated:

> Waste itself is a misleading word in the context of the committee's activity. Much … agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses…. *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (emphasis added).

First, the *Seaboard Foods* complaint upon which Plaintiffs rely was not filed by EPA, but by the Department of Justice. DOJ filed the complaint to enforce an EPA Administrative Order ("AO"). *See* Mot. Ex. 123 (Complaint); Dkt. No. 1628 Ex. 6 (*Seaboard Farms* Administrative Order). Far from reflecting EPA's views, the Complaint sweeps substantially more broadly than the underlying proceedings. EPA's AO sought to "identify, investigate, and prevent the mishandling … of any solid waste" on the targeted swine facilities. *See* Dkt. No. 1628 Ex. 6 ¶7. It said nothing about land-applied manure but rather sought to investigate swine effluent that had "leaked into ground water in various ways, such as from a lagoon or associated infrastructure (piping)." *Id.* at ¶33; *see id.* at ¶¶60, 74-106 (discussions regarding leaking effluent). Materials that have leaked from a storage facility rather than being put to their beneficial or intended use have been consistently treated as RCRA waste. *See Craig Lyle Ltd.*, 877 F. Supp. at 481-82; *Zands*, 779 F. Supp. at 1262; *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F.Supp. 671, 675 (N.D. Ga. 1993); *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1236-37 (E.D. Pa. 1993). Conversely, animal manure applied as a fertilizer has not. *See* RCRA Mot. at 14-17. Because the Complaint is not consistent with the underlying EPA order it purported to enforce, it can hardly be said to definitively reflect EPA's official view.

Second, even if the *Seaboard Foods* complaint did represent EPA's intended litigating position, it would still not define EPA's position for deference purposes. Indeed, the Supreme Court has repeatedly made clear that positions adopted during the course of litigation merit no deference. *See Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 740-41 (1996); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

Defendants agree with Plaintiffs that the Court should defer to EPA's prevailing

interpretation of "solid waste" as regards land applied animal manures in resolving this issue on summary judgment. *See* Mot. at 44 (citing *Phillips Petroleum*, 803 F.2d at 545). EPA's three-decade long practice of excluding such animal manures from RCRA "solid waste" plainly prevails over DOJ's litigating position in a single case.

B. Defendants Do Not "Contribute To" the Handling or Disposal of Poultry Litter in the IRW

RCRA citizen suits apply only to those who have "contributed to" the "handling, storage, treatment, transportation, or disposal" of "solid waste." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs now propose that Defendants should be held liable under RCRA for contributing to the decisions of hundreds of non-party farmers and ranchers who own and control the poultry litter that is the focus of this lawsuit. *See* Mot. at 44-47. Plaintiffs' sweeping construction of RCRA is legally deficient, and even if correct, would at most raise disputed factual issues for the jury.

Plaintiffs argue that, as used in RCRA, to "contribute to" means to "'have a part or share in producing an effect.'" Mot. at 44-45 (quoting *Cox v. City of Dallas*, 256 F.3d 281, 294-95 (5th Cir. 2001)). Plaintiffs read *Cox* to require little more than a showing of cause-in-fact, a standard that sweeps up anyone who has the remotest nexus to the alleged endangerment-creating activity. Indeed, in the commercial context this would readily capture anyone connected to a party's supply chain: if Defendants can be held liable for providing feed and medicine, *see* Mot. at 46-47, then why not also the utility companies that provide water and electricity, or the contractor who builds the growing houses? Plaintiffs' standard lacks any limiting principle.

Courts have rejected such an untethered understanding of "contributing to" liability, instead consistently requiring RCRA plaintiffs to prove both actual and proximate causation to establish contribution liability. *See In re Voluntary Purchasing Groups, Inc.*, 2002 WL 31431652, at **5-7 (N.D. Tex. Oct. 22, 2002) ("Plaintiffs must establish some level of causation

between the Defendant and the contamination to prevail in a 'contributing to' cause of action under RCRA"); *see also K-7 Entps. L.P. v. Jester*, 562 F. Supp. 2d. 819, 830-31 (E.D. Tex. 2007); *Hudson Riverkeeper Fund, Inc. v. ARCO*, 138 F. Supp. 2d 482, 487 (S.D.N.Y. 2001); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999); *Zands*, 779 F. Supp. at 1264; *First San Diego Properties v. Exxon Co.*, 1994 WL 424209, at *3 (S.D. Cal. 1994). Specifically, Plaintiffs must prove that Defendants either handled, stored, treated, transported, or disposed of poultry litter, or controlled someone else's decisions about how to handle, store, treat, transport, and use the litter. *Compare United States v. Aceto Ag. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (defendant liable for "contributing to" where the record was sufficient to allow an inference that it controlled a waste-disposing process), *with In re Voluntary Purchasing Groups*, 2002 WL 31431652, at *6 & n.2, *and S. Fl. Water Mgt. Dist. v. Montalvo*, 84 F.3d 402, 408-09 (11th Cir. 1996) (defendants not liable under CERCLA where they did not control the waste-disposing process). Without some showing of control, RCRA would sweep far beyond its intended boundaries. Plaintiffs' overly generous reading must be rejected.

Even if Plaintiffs were correct that something less than actual or implied control is sufficient for RCRA "contributing to" purposes, Plaintiffs have not demonstrated a basis for summary judgment. First, Plaintiffs' allegedly undisputed facts are in the main disputed. *See* Mot. at 46-47. For example, Growers, not Defendants, own the poultry litter generated on their farms. *See* RCRA Mot. at 4 ¶¶15-17. Growers, not Defendants, decide whether, when and how to apply the litter, limited only by the field-specific litter application plans that Oklahoma drafts for them. *See id.* at 4-5 ¶¶18-21; Disputed Facts ¶10. Defendants have little to say regarding when or how Growers remove poultry litter from their barns, and in no way participate in or control the Growers' decision to sell, distribute, store or use their poultry litter at their own

discretion. *See* RCRA Mot. at 4-5 ¶¶18-21; Disputed Facts ¶¶10, 10(i). If Growers sell or barter their litter, they alone select the purchaser, determine the details of the transaction, and receive the proceeds. *See* RCRA Mot. at 20-21; Disputed Facts ¶10. Much of the litter that is utilized in the IRW is applied by farmers and ranchers who are not Growers, but who purchase the litter on the open market. *See* RCRA Mot. at 3-4 ¶¶10-12. It cannot be said that Defendants control the decisions of these numerous non-parties. The most Plaintiffs can prove that Defendants are involved with the poultry growing process. But Plaintiffs have identified no evidence that Defendants contribute to the myriad specific decisions about how and when to buy, sell, transport, or utilize poultry litter. Finally, separately, Defendants dispute Plaintiffs' central thesis that phosphorous from poultry litter causes injury in the IRW. See Disputed Fact ¶39.

Second, Plaintiffs have not identified sufficient company-specific evidence that each Defendant contributes to the creating of a substantial endangerment. *See* Dkt. No. 2069 at 1-3, 5-8, 16-21 (May 18, 2009). While Plaintiffs insist on pursuing this case in the aggregate, no Defendant class has been certified and Plaintiffs must prove their case against each individual defendant. Plaintiffs recognize this need for specific proof with regard to any affirmative defenses Defendants may raise, *see* Mot. at 62-64 (demanding field-specific proof to invoke Oklahoma's "right to farm" statute), yet, Plaintiffs' recitation of the alleged evidence supporting their case relies chiefly on generalized allegations. *See* Mot. at 46-47. This is insufficient to substantiate summary judgment against each individual Defendant. Thus, summary judgment should be granted to Defendants because Plaintiffs have failed to carry their burden on an essential element of their RCRA claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). At most, even if Plaintiffs' legal theory is correct, their claim that Defendants "contributed to" a RCRA violation must be tried to a jury to establish facts relating to each Defendant.

C. Plaintiffs Have Not Proved that Phosphorous from Poultry Litter Poses a Substantial Endangerment to the Environment in the IRW

Finally, Plaintiffs ask the Court to grant them summary judgment on the central disputed factual issue in the case, whether the organic phosphorous compounds contained in poultry litter have the potential to cause environmental injury in the IRW. Plaintiffs' argument on this point is both legally deficient and factually disputed.

The parties agree that the relevant legal standard is set out in *Burlington Northern & Santa Fe Ry Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), where the Tenth Circuit explained that a RCRA citizen suit may be predicated on either "actual harm" or a mere "risk of threatened harm." *Id.* at 1021. Plaintiffs advance the latter theory, arguing that phosphorous from poultry litter creates a risk of threatened harm to the environment. *See* Mot. at 47-51. However, Plaintiffs take *Burlington Northern* to endorse RCRA liability based on any "potential threat of harm." Mot. at 48-50. This stretches the Tenth Circuit's decision too far. The court did not hold that *any* potential threat is sufficient. Rather, it held that in order to be judicially cognizable, the alleged risk must be "substantial," which means that it must be "serious." *Id*. Therefore, a RCRA citizen suit Plaintiff must not merely allege a theoretical or potential possibility of injury, but rather must demonstrate "reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of [solid waste] in the event remedial action is not taken." *Id*.

Plaintiffs posit a theory of risk, but cannot demonstrate that it constitutes an actual risk. Plaintiffs' overreaching is best illustrated by the Tenth Circuit's recent rejection of their appeal from this Court's denial of their motion for a preliminary injunction. *See Tyson Foods*, 2009 WL 1313216, at *4-5 (discussing applicable RCRA standard). Plaintiffs there advanced the same reading of *Burlington Northern* that they now press on this Court. *See* Appellants' Opening

Brief, *Oklahoma v. Tyson Foods, Inc.*, No. 08-5154, at 31-34 (10th Cir. 2008). Plaintiffs argued that this Court erred in not considering:

> the State's evidence regarding (1) the fecal bacteria in poultry waste and the mobility of the waste in the environment, (2) the method by which poultry waste is disposed of throughout the lands of the IRW, (3) the vulnerability of the waters of the IRW to pollution as result of the type of soil, terrain and geology of the disposal sites, (4) the volume of poultry waste that is disposed of in the IRW in this manner, (5) the concentrated time frame during which time the majority of poultry waste is disposed of in the IRW and its correlation with recreational uses, (6) the pathways to waters that disposed of poultry waste and its constituents can (and do) travel once they are in the IRW environment, (7) the concentrations of these poultry waste constituents in the waters of the IRW, and (8) the human activity occurring in the waters of the IRW in making its determination as to whether the land disposal of poultry waste "may present" an imminent and substantial endangerment to human health.

Id. at 34-35. These allegations, they argued, demonstrated a sufficient risk for RCRA purposes. *See id.* at 35. The Court of Appeals disagreed, concluding that "Oklahoma failed to link land-applied poultry litter and the bacteria in the IRW…. Oklahoma's inability to make this necessary evidentiary link meant that it could not establish that poultry litter may be a risk of harm in the IRW waterways." *Tyson Foods*, 2009 WL 1313216, at *4. In sum, even if the evidence demonstrated a hypothetical risk under the right circumstances, Oklahoma did not prove an actual risk (as distinct from actual injury) in the IRW, and therefore had not shown a "risk of threatened harm" under *Burlington Northern*. 505 F.3d at 1021.

Here, Plaintiffs present essentially the same case with regard to phosphorous, again focusing on the volume of litter in the IRW, its potential to travel through the environment after periods of high rainfall, and phosphorous measurements in surface waters. *See* Mot. at 50-51 (listing claimed evidence). But as the Tenth Circuit recognized with regard to bacteria, Plaintiffs still have no evidence linking phosphorous in surface waters to orthophosphates in poultry litter, and have made no effort to account for the many alternate (and more proximate) sources of phosphorous in the IRW. *Compare Burlington N.*, 505 F.3d at 1020-21, *with* Mot. at 50-51; *see*

Disputed Facts ¶¶43-45. Absent proof connecting the two, it cannot simply be assumed that any environmental injury caused by phosphorous in the IRW is attributable to poultry litter. In short, Plaintiffs cannot prove a substantial risk of endangerment.

Moreover, even if Plaintiffs relied upon the correct legal test, the evidence they assert is uniformly disputed. Defendants have adduced evidence challenging Plaintiffs' allegations regarding the manner and locations of poultry litter application, *see* Disputed Facts ¶¶28-33; whether poultry litter has been "over applied", *see* Disputed Facts ¶¶37-39; assumptions regarding the mobility of phosphorous in the IRW, *see* Disputed Facts ¶¶31, 35, 42, 46; whether phosphorous from poultry litter in fact reaches state waters, *see* Disputed Facts ¶¶47-48; whether poultry litter, as opposed to other sources such as cattle and waste water treatment facilities, is the dominant source of relevant forms of phosphorous in the IRW, *see* Disputed Facts ¶43-45; and regarding the ability of phosphorous to adversely affect surface waters in the IRW, *see* Disputed Facts ¶49-52. No matter how "liberally construed," Mot. at 51, RCRA does not support an award of summary judgment in the face of such factual disputes.

CONCLUSION

For the foregoing reasons, Defendant Tyson Poultry, Inc. respectfully urges the Court to deny Plaintiffs' request for partial summary judgment as to CERCLA and RCRA in its entirety.

Respectfully submitted,

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